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NTSB Order No. EA-4525

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 5th day of February, 1997

BARRY L. VALENTINE, Acting Administrator, Federal Aviation Administration, Complainant, v. TIMOTHY SCOTT BOGER, Respondent.	)	Docket SE-14183

OPINION AND ORDER

The respondent has appealed from the oral initial decision Administrative Law Judge William E. Fowler, Jr., rendered on March 20, 1996, at the conclusion of an evidentiary hearing on an order of the Administrator that suspended respondent's Airline Transport Pilot certificate for 90 days.[1] The law judge concluded that the Administrator had proved his allegations that

[1]An excerpt from the hearing transcript containing the initial decision is attached.

respondent, as pilot-in-command of an aircraft that was not certified to fly in icing conditions, had violated section 91.13(a) of the Federal Aviation Regulations ("FAR," 14 CFR Part 91)[2] by operating a flight, with three passengers aboard, into an area in which, consistent with preflight weather information obtained by him, severe icing was encountered. Based on his judgment that the Administrator had not established that respondent had failed to give his passengers at the outset of the flight a briefing on how to fasten and unfasten their safety belts, the law judge dismissed a charge under FAR section 91.107(a), and modified the Administrator's order to provide a 60-day suspension.[3] As we find, for the reasons discussed below, no basis in any of respondent's substantive and procedural objections for reversing the initial decision, the appeal will be denied.

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[2]FAR section 91.13(a) provides as follows:

> § 91.13 **Careless or reckless operation.**
>
> (a) *Aircraft operations for the purpose of air navigation.* No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

[3]The Administrator, who has filed a reply opposing the respondent's appeal, originally noticed an appeal from the law judge's decision, but subsequently withdrew it. Thus, the validity of the law judge's ruling on the section 91.107(a) charge is not before us on this appeal.

The Administrator's August 2, 1995 order of suspension, as amended, alleged, among other things, the following facts and circumstances respecting the charge upheld by the law judge:

> 1. You are the holder of Airline Transport Pilot Certificate Number 2505279.
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> 2. On or about January 16, 1995, you acted as pilot-in-command of a Cessna CE-31-Q aircraft, identification number N7943Q (hereinafter referred to as "the aircraft"), on a flight filed under an Instrument Flight Rules (IFR) flight plan, enroute from Canton Airport, Ohio, to Lancaster, Pennsylvania, with three passengers aboard (hereinafter referred to as "the flight").
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> * * * * *
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> 4. The aircraft was not certified to fly into known icing conditions.
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> 5. During the flight, you flew into known and severe icing conditions.
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> 6. As a result of the above, the aircraft experienced excessive ice accretion.
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> 7. As a result of the excessive ice accretion, you were forced to crash land the aircraft at Clarion County Airport, Pennsylvania.
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> 8. As a result of the crash, the aircraft was destroyed and two passengers were injured.

The law judge was not persuaded by respondent's arguments to the effect that his operation of an aircraft into an area of forecast and reported icing conditions should not be held to constitute careless or reckless operation. Like the law judge, we find no merit in the respondent's position.

Respondent does not deny that he knew from the weather report he obtained from the Direct User Access System ("DUATS") before the subject flight that freezing temperatures and visible

moisture would be a concern along much of his intended route or that he knew that such conditions are conducive to the formation of ice on an aircraft passing through them. He also does not deny that the DUATS report included a SIGMET warning of severe icing, based on aircraft reports, covering the geographical areas of Ohio and Pennsylvania that he would be transitting.[4] Respondent nevertheless argues that it should not be considered careless or reckless for a pilot to fly into "known icing conditions" since, among other things, the Administrator has not defined the phrase, which respondent believes is too vague and confusing for a pilot to understand. In this connection, the respondent asserts that forecasts are no more than guesses, whereas "known icing conditions" implies a certainty of icing that may not, in fact, be experienced when an aircraft flies through the area to which the forecast applies.[5] We do not agree that this circumstance precludes reliance on the phrase for

[4]The Airman's Information Manual states that a SIGMET is "[a] weather advisory issued concerning weather significant to the safety of all aircraft. SIGMET advisories cover severe and extreme turbulence, severe icing, and widespread dust or sandstorms that reduce visibility to less than 3 miles." See Adm. Exh. A-8. An FAA inspector testified to the effect that no aircraft should venture into an area of severe icing because severe icing means that, even as to aircraft certified for flight into known icing conditions, the ice will accumulate faster than deicing equipment can remove it.

[5]The Board has long viewed the phrase "known icing conditions" to include predicted weather: "We do not construe the adjective 'known' to mean that there must be a near-certainty that icing will occur, such as might be established by pilot reports....Rather, we take the entire phrase to mean that icing conditions are being reported or forecast in reports which are known to a pilot or of which he should be reasonably aware." See Administrator v. Bowen, 2 NTSB 940, 943 (1974).

purposes of evaluating the degree of prudence a pilot has demonstrated in operating a flight.[6]

Respondent insists, in effect, that he needed a definition of "known icing conditions" in order to be able to heed an admonition in the owner's manual for the aircraft he was flying to avoid such an area "whenever possible." We disagree. Respondent did not need a definition of "known icing conditions" to avoid flying through an area he concedes he knew was forecast to contain conditions in which icing was a definite risk factor.[7] Moreover, we do not concur in the view that the possibility that an aircraft could pass through such an area without experiencing any accretion of ice, perhaps because of nonmeteorological factors related to the condition and design of the aircraft, so

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[6]We recognize, of course, that the phrase can be interpreted in different ways. For example, it could refer to an area in which the air temperature is forecasted to be at or near freezing, such that any liquid moisture might collect as ice on an aircraft moving through it, or that icing has in fact already been experienced by aircraft moving through those conditions there. In either of these cases, however, a pilot with knowledge of an icing-conditions forecast would have sufficient information for purposes of determining where his aircraft could be safely operated in view of predicted weather and the aircraft's de-icing capability. We accordingly see no merit in respondent's various arguments to the effect that the phrase is unconstitutionally vague or imprecise. That conditions known to be capable of producing aircraft icing occasionally do not is not a reason to find that the phrase "known icing conditions" does not adequately inform an airman of the potential for a hazardous circumstance of vital importance to safe flight operations.

[7]Respondent also did not need to have a definition of "known icing conditions" in order to heed the admonition in his aircraft's Owner's Manual that such conditions "should be avoided whenever possible" because the aircraft's "wing and horizontal stabilizer deice boots alone do not provide protection for the entire aircraft" (Adm. Exh. A-4 at 2).

robs the phrase of predictive value that it can or should be disregarded for flight planning purposes.[8] A prudent pilot seeks to eliminate, not to discount, the hazards to safe flying that adverse weather can produce.

Although respondent's crash landing is consistent with his apparent willingness to engage in a kind of weather Russian roulette, whereby forecasts of icing conditions are rejected in favor of personal airborne observation, our agreement that he at least carelessly, if not recklessly, endangered the lives and property of others, within the meaning of FAR section 91.13(a), is unrelated to the unsurprising outcome of the flight. It rests, rather, on his operation of a flight into an area of both forecast icing conditions and reported severe icing, in an aircraft whose manual advised against entering weather conditions in which icing might occur.[9] We have no hesitancy in concluding

[8]What respondent is really arguing, we think, is not that he did not understand the meaning of this expression, which is largely self-explanatory, but that he should be free to ignore it because the danger about which it seeks to give notice may only be a potential one that may not actually be realized. The fact flying into known icing conditions does not invariably mean that a dangerous, irreversible buildup of ice will occur is not, in our judgment, justification for taking such an avoidable gamble with passenger safety.

[9]Respondent suggests that flight within icing conditions was permissible in the Cessna 310 because its operator's manual does not specifically prohibit flight into such conditions and, in fact, it gives instructions on how to use the aircraft's deicing equipment correctly if icing is experienced. In the first place, while aircraft manufacturers can be expected to provide advice as to the operational limits or parameters for their products, it is not within their authority to forbid operations their aircraft were not designed to accommodate. In the second place, we do not construe a manufacturer's advice on how best to escape from icing conditions to be an endorsement of flying into them.

that such conduct was unsafe, in that it, among other things, unnecessarily and unjustifiably exposed the aircraft's occupants to the peril of suffering the all too frequently lethal consequences of flying where the likelihood of inextricable aircraft icing is unacceptably high.

Our review of the administrative record persuades us that, contrary to the respondent's assertion that various errors by the law judge deprived him of procedural due process, respondent received a full and fair hearing. While most of respondent's arguments warrant no discussion, a few raise issues that merit brief comment.

Respondent maintains that reversible error was committed by the law judge because of his questioning of some witnesses and because of his failure, unexplained in the record, to issue two subpoenas the respondent had requested. We find no reversible error in regard to these matters. As to the subpoenas, it would appear that respondent's expert witness, John Gordon, did not appear at the hearing because of weather-related travel problems, not because he had not received a subpoena. Moreover, given the proffer of this witness' testimony by counsel for respondent, the law judge's refusal to continue the case so that Mr. Gordon could testify in person was not an abuse of discretion: Mr. Gordon's views appear to be largely duplicative of respondent's, and his essential opinions concerning, for example, the dire negative economic impact on fixed-base operators of not allowing flights into forecast icing conditions, albeit of doubtful relevance in

this proceeding, were presented to the law judge. The failure to issue a subpoena for William Koshar, the FAA inspector who investigated the matter, but was unavailable on the date of the hearing, likewise produced no discernible prejudice to respondent's ability to defend himself. The charge upheld against him was advanced by the Administrator, not his investigating inspector, who had no percipient or other knowledge concerning the case that could not be adequately advanced, for purposes of informing the respondent of the Administrator's reasons for believing that he had acted contrary to the interests of air safety, by another inspector who Koshar had briefed and who had access to the investigative file.

The complaint concerning the law judge's questioning, which he is authorized to do by our procedural regulations,[10] fares no better, for our review of the record does not persuade us that the information he sought to elicit from the parties' witnesses revealed any bias by the law judge of any kind. Thus, the fact that testimonial evidence arguably damaging or favorable to one side or the other may have resulted from the law judge's proper efforts to ensure that the record was fully developed on all pertinent issues is a foreseeable consequence of the law judge's authority that provides no ground for objection.

[10]See Section 821.35(b)(3), 49 CFR Part 821, which expressly gives our law judges the power to examine witnesses.

ACCORDINGLY, IT IS ORDERED THAT:

1. The respondent's appeal is denied;

2. The order of the Administrator, as modified by the law judge, and the initial decision are affirmed; and

3. The 60-day suspension of respondent's airman certificate shall commence 30 days after service of this opinion and order.[11]

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order.

[11]For purposes of this decision, respondent must physically surrender his certificate to an appropriate representative of the Administrator, pursuant to FAR section 61.19(f).